STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 8, 2012
v	No. 304113 Saginaw Circuit Court
ROBERT DEON WALKER, Defendant-Appellant.	LC No. 10-033924-FC

Before: FITZGERALD, P.J., and MURRAY and GLEICHER, JJ.

PER CURIAM.

Defendant was convicted by a jury in the shooting death of Glenn Coleman, and now appeals by right from his convictions of first-degree premeditated murder, MCL 750.316(1)(a), carrying a concealed weapon (CCW), MCL 750.227, discharge of a firearm in a building, MCL 750.234b, and two counts of possession of a firearm while committing a felony (felony-firearm), MCL 750.227b. The circuit court sentenced defendant to concurrent sentences of life in prison for the murder conviction, two to five years for CCW, two to four years for discharge of a firearm at a building, and a consecutive sentence of two years for each of the felony-firearm counts. We affirm.

Defendant first argues that the trial court erred in allowing the preliminary hearing testimony of Javon McKinney to be read to the jury on the basis that he was declared an unavailable witness. We review a trial court's ruling on the admissibility of previous testimony for an abuse of discretion. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). An abuse of discretion occurs when the trial court chooses an outcome falling outside a principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Both the United States and Michigan Constitutions provide an accused with the right to be confronted with the witnesses against him. US Const, Am VI; Const 1963, art 1 § 20. However, MRE 804(b)(1) allows the use of former testimony in a proceeding where the declarant of the testimony is unavailable as a witness. According to MRE 804(a)(5), a declarant is unavailable when the declarant "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown." The right to confront one's accuser is not violated by the use of preliminary examination testimony as substantive evidence at trial where

the prosecution has exercised due diligence to produce the absent witnesses. *People v Bean*, 457 Mich 677, 682-683; 580 NW2d 390 (1998).

We reject defendant's argument that the trial court errantly admitted McKinney's statement, as we conclude that the trial court did not abuse its discretion in finding that due diligence was exercised to locate him. The test for due diligence is one of reasonableness, i.e., "whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *People v James (After Remand)*, 192 Mich App 568, 571-572; 481 NW2d 715 (1992). The reasonableness of good-faith efforts to procure testimony depends on the facts and circumstances of each case. *Bean*, 457 Mich at 684.

Saginaw Police Detective Timothy Fink testified that he attempted to locate McKinney the day before trial after McKinney's subpoena was returned because McKinney was not at the address contained in the subpoena. Fink visited the home of McKinney's aunt, where he previously lived, and was told that McKinney moved out of the state with his mother. Fink called McKinney's mother three times and left messages; the calls were not returned. Fink also looked for McKinney at another address he knew was connected to McKinney. Additionally, Fink checked to determine that McKinney was not incarcerated in any state, and the Department of Human Services (DHS) informed the officer that it did not know of his location. DHS did provide McKinney's last known address, but Fink found the apartment at that address to be vacant, and the post office did not have a forwarding address. On the first day of trial the court found that due diligence was used to attempt to locate McKinney, but still wanted efforts to contact him continued while it issued a bench warrant.

Saginaw Police Detective Matthew Gerow spoke with McKinney's mother the day before trial and McKinney's mother informed McKinney to call Gerow. McKinney did not call Gerow. On the day of trial, however, a trial spectator with Gerow present called a number that she had for McKinney. Gerow recognized McKinney's voice and the person who answered identified himself as "Jo-Jo," McKinney's nickname. Gerow asked the person on the phone where he was and whether he was coming to court, but the person on the phone then stated that they called the wrong number and hung up the phone. Fink then called the number and McKinney returned his call. McKinney told Fink that he was not going to testify because he did at the preliminary hearing and the home of the mother of his child was shot at and he feared for his family.

It is clear from the record that the trial court correctly concluded that plaintiff exercised due diligence in trying to obtain the trial testimony of McKinney. Fink's efforts prior to trial were thorough and he followed up on the leads he had been provided. During trial, Gerow's efforts resulted in his contacting McKinney, and then Fink followed up on the lead. A bench warrant was issued, but McKinney was not found. The efforts extended by the police to produce McKinney satisfy any test of due diligence.

Next, defendant argues that the trial court erred when it admitted into evidence a photograph of the tattoos on defendants forearm.[1] Plaintiff argued that defendant's tattoos were relevant as evidence of defendant's state of mind or intent at the time of the shooting. However, no evidence or explanation was offered to suggest how defendant's tattoos related to his state of mind or intent to commit these crimes. There was no evidence or argument regarding what the tattoos symbolized or what defendant's state of mind was when he obtained the tattoos. See *People v Gipson*, 287 Mich App 261, 262-263; 787 NW2d 126 (2010). Thus, the evidence should not have been admitted. Nonetheless, given the weight of the other evidence adduced, particularly the eyewitness evidence to the killing, the erroneous admission of the tattoos was harmless. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Defendant also argues that he is entitled to a new trial because hearsay evidence regarding DNA testing results was improperly admitted through the testimony of Detective Gerow. Defendant's failure to object to the testimony below means that we review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Reversal is warranted only if the plain error resulted in the conviction of an innocent defendant or if the error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of defendant's innocence. *Id.*

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007). Hearsay is generally not admissible unless it meets the requirements of one of the hearsay exceptions set forth in the Michigan Rules of Evidence. *Stamper*, 480 Mich at 3, citing MRE 802.

Gerow testified to DNA test results that showed, in essence, that McKinney and Demetrick Mounger were present at some time in the home where the victim was shot and killed. A laboratory report prepared by a nontestifying analyst is hearsay. *People v Payne*, 285 Mich App 181, 195-196; 774 NW2d 714 (2009). And, where a business record is prepared in preparation for litigation, as this report was, it is inadmissible because "'the source of information or the method or circumstances of preparation indicate lack of trustworthiness.'" *People v Huyser*, 221 Mich App 293, 296 n 2; 561 NW2d 481 (1997), quoting MRE 803(6); see also *People v McDaniel*, 469 Mich 409, 413-414; 670 NW2d 659 (2003). Thus, reports containing hearsay DNA evidence prepared for adversarial purposes are not admissible as business records under MRE 803(6) or as public records under MRE 803(8). *Payne*, 285 Mich App at 195-196. Accordingly, the detective's testimony regarding the contents of the DNA report that was prepared in preparation for trial was inadmissible hearsay.

However, defendant has not demonstrated that admission of the DNA evidence was outcome-determinative plain error resulting in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings

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[1] A police officer testified that the tattoos read "survival of the fittest," "kill or be killed," "feel my pain" with a picture of a razor blade and blood, and the initials "F.B."

independent of the defendant's innocence. For one, the DNA evidence did not directly implicate defendant as he was not even tested. Second, although the evidence placed two eyewitnesses at the scene, the witnesses themselves testified at trial that they were present at the shooting and that they had been in and out of the home several times the day of the shooting. Where a hearsay statement is not substantive evidence of guilt, but rather merely corroborates other properly admitted testimony, it is more likely that the error was harmless. *People v Gursky*, 486 Mich 596, 620-621; 786 NW2d 579 (2010).

Next, defendant argues that he was denied a fair trial because of the prosecutor's misconduct during closing argument. Specifically, defendant argues that the prosecutor implied that defendant had a duty to produce exculpatory evidence, which improperly tended to shift the burden of proof. See *People v Heath*, 80 Mich App 185, 188; 263 NW2d 58 (1977). Defendant did not raise this issue below. *Carines*, 460 Mich at 774.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Prosecutors are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). Importantly for this case, although a defendant has no burden to produce any evidence, once the defendant advances a theory, argument on the inferences created does not shift the burden of proof. *People v Reid*, 233 Mich App 457, 478-479; 592 NW2d 767 (1999).

Here, defendant refers to three specific arguments by the prosecutor that he claims were improper. The first was the prosecutor asking, "[H]as there been any evidence of animosity between either Mr. Mounger or Mr. McKinney and the victim?" The second was, "[H]as there been any evidence of animosity between Mr. McKinney and the defendant, any reason for defendant to kill him?"[2] The third comment was, "Did you hear any evidence at all that people on the street were saying that Mr. Mounger committed this crime?"

However, these comments were made in response to argument advanced by defendant, much of which was directed at challenging the credibility of McKinney and Mounger. Specifically, defendant argued to the jury that the evidence tended to establish that either McKinney or Mounger committed the crime (or that this was just as likely as plaintiff's theory of the case), directly putting to the jury that there was a dispute between these witnesses and defendant. For example, defendant asserted that "apparently there was a dispute between [Coleman] and Mr. Mounger . . . . Mr. Coleman made up his own rules and Mr. Mouger didn't like it." Regarding McKinney, defendant argued that McKinney "needed a scapegoat," implying that McKinney killed Coleman. In light of the context of these statements, the prosecutor did not engage in any misconduct.

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[2] Given the prosecutor asking whether there was "any reason for the defendant to kill him," it is reasonable to assume that the reference was supposed to be to "any evidence of any animosity between McKinney and" Coleman.

Next, defendant argues that his trial counsel provided ineffective assistance by failing to call important witnesses, not properly cross-examining important witnesses, not requesting a curative instruction to an improper comment by the prosecutor, and failing to locate two potential witnesses. Claims of ineffective assistance of counsel that are unpreserved, as is this one, are limited to review for errors apparent on the record. *Unger*, 278 Mich App at 253.

A defendant's right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963 art 1, § 20. This right to counsel encompasses the effective assistance of counsel. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). To establish a claim of ineffective assistance of counsel a defendant must show (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense. *People v Taylor*, 275 Mich App 177, 186; 737 NW2d 790 (2007). Defendant must also show that the resultant proceedings were fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). A counsel's performance is deficient if it fell below an objective standard of professional reasonableness. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). The performance prejudiced the defense if it is reasonably probable that, but for counsel's error, the result of the proceeding would have been different. *Id.*

The right to effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). The effective assistance of counsel is presumed, and the defendant bears the heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Defense counsel's decisions are presumed sound trial strategy, *Taylor*, 275 Mich App at 186, and a reviewing court is not to substitute its judgment of trial strategy with the benefit of hindsight, *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant first argues that his trial counsel should have called two witnesses, Rosevalt and Kenya Crayton (defendant's sister), who would have testified that McKinney was not at a party that McKinney testified he attended. McKinney testified that Crayton's phone was stolen at the party. Another witness, D'Quayvion Hamilton, testified that Coleman and McKinney were at the party and there was a confrontation between Coleman and defendant's sister. Defendant states that he informed his trial counsel that Rosevalt would provide testimony that disputed the testimony of McKinney and Hamilton.

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy which we will not second-guess with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defense counsel's duty is to prepare, investigate, and present all possible defenses. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). Defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). A substantial defense is defined as one that might have made a difference in the outcome of the trial. *Id.* "Failure to make a reasonable investigation can constitute ineffective assistance of counsel." *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005).

Here, there was no record of what defendant's trial counsel knew about these potential witness or how he responded if he knew. In other words, defendant's claim depends on facts not

of record. It is his burden to make a testimonial record at the trial court of evidence supporting his claim which excludes hypotheses consistent with the view that his trial lawyer represented him adequately. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997), citing *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973). He has failed to do so. Without such a record, the argument rests on defendant's self-serving representations of what the two witnesses would have testified to. This is not sufficient to overcome the presumption that counsel rendered effective assistance.

Defendant further argues that he informed his trial counsel that McKinney testified against defendant because of conflict between the families of McKinney and defendant resulting from defendant spending money that he was asked to pick up for McKinney's father who was in jail. Defendant also argues that he informed his trial counsel that he shot Mounger in the leg during a confrontation. Again, there was no record evidence to indicate what defendant's trial counsel knew of any such evidence. Further, trial counsel did present a defense questioning the credibility of the testimony of McKinney and Mounger based on inconsistencies in their testimony, their history of involvement in drugs, and the theory that they had committed the drug-related murder. Moreover, it is plausible that trial counsel would not want evidence admitted that defendant shot someone or that he stole money from an imprisoned person. There was no evidence to overcome the presumption that trial counsel's strategy was sound, *Dixon*, 263 Mich App at 396, and defendant was not denied a substantial defense, *Ayres*, 239 Mich App at 22.

Defendant also argues that his trial counsel was ineffective in failing to request a curative instruction to an inadmissible statement. On cross-examination, Mounger testified that he had problems with someone from defendant's family. Plaintiff then attempted to question Mounger about threats that he had received:

> *Plaintiff*: [Defense counsel] asked you questions about being threatened. Is that correct?
>
> *Mr. Mounger*: Yep.
>
> *Plaintiff*: Or being assaulted?
>
> *Mr. Mounger*: Yep.
>
> *Plaintiff*: Have you been assaulted since you gave these statements to police?
>
> *Defense Counsel*: Objection, your Honor.

The trial court sustained defendant's objection because defendant was not shown to be involved in any threat.

Defendant argues that plaintiff's questions left the jury with the impression that defendant's family threatened Mounger, and that such a prejudicial error could not be cured with an instruction. See *People v Messenger*, 221 Mich App 171, 179-180; 561 NW2d 463 (1997). Even though Mounger's testimony was that he had a problem with a member of defendant's family, this "problem" was not defined. There was no evidence admitted that he had been

threatened. Further, the court instructed the jury that the attorneys' questions and comments were not considered as evidence. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The performance of defendant's trial counsel was not deficient by not requesting a curative instruction because no evidence of a threat against Mounger was admitted.

We likewise reject defendant's argument that his trial counsel was ineffective in not investigating the whereabouts of two potential witnesses, Robert Witherspoon and Glenn Tamel. Police found a receipt containing the name of Tamel, and an identification for Witherspoon in a coat that was in the room of the shooting. The police attempted to locate the men, but were unsuccessful. The reasonableness of an attorney's investigation is determined by considering whether the known evidence would lead a reasonable attorney to investigate further. *Wiggins v Smith*, 539 US 510, 527; 123 S Ct 2527; 156 L Ed 2d 471 (2003). Here, there was no evidence that would have prompted defense counsel to investigate further. The two eyewitnesses did not place the men at the scene of the shooting or indicate that the men were involved in the shooting, and defendant does not assert that the men knew anything related to the shooting.[3]

We also reject defendant's argument that the trial court erred in refusing defendant's request to give the jury voluntary manslaughter instructions. We agree with the trial court that there were no facts that would support a voluntary manslaughter charge. To show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions. *People v Mendoza*, 468 Mich 527, 535; 664 NW2d 685 (2003). In particular, defendant argues that evidence supported the theory that the shooting occurred in the heat of passion with provocation because there was a confrontation with Coleman where defendant was angry over defendant's sister's phone and defendant had to put his hand up to keep Coleman away in the moments prior to the shooting.

Once again, the evidence fails to support defendant's argument, as the evidence indicated that the incident between defendant's sister and Coleman occurred the week prior to the shooting, providing time for defendant to control his passions. Additionally, the evidence showed that during the confrontation with defendant just before Coleman was shot, defendant was pointing a gun at Coleman while Coleman was panicked, walking around the room, and searching his pockets. The evidence indicated that defendant was directing Coleman, asking him about the phone, telling him to empty his pockets, directing him to lie on the floor. As defendant left the home, defendant instructed McKinney not to report the shooting. The evidence did not

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[3] Defendant also argues that he was denied a fair trial when the prosecutor made a fraudulent representation to the trial court about the extent of Hamilton's proposed testimony. The foundation for defendant's argument is lacking, as the prosecutor told the court that what he had represented would be the extent of the testimony. He did not tell the court that Hamilton had not made any other statements regarding the incident. The two are different representations.

support the giving of a voluntary manslaughter instruction to the jury. See *People v Cheeks*, 216 Mich App 470, 479-480; 549 NW2d 584 (1996).

Lastly, defendant argues that the cumulative effect of the many errors he has alleged denied him of a fair trial. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). However, the only errors that defendant demonstrated were two evidentiary errors: the admission of defendant's tattoo and hearsay regarding DNA test results. As we already concluded, neither isolated nor together do these errors require reversal. The jury had more than sufficient evidence to convict defendant independent of, and undisturbed by, these evidentiary errors.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Christopher M. Murray
/s/ Elizabeth L. Gleicher